IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.112 OF 2002

1. Shri Dattaram V. Dharwadkar,
   major, Headmaster,

2. Smt. Shradha D. Dharwadkar,
   major, housewife,
   both resident of Arabo-
   Dhargal,Pernem, Goa..... PETITIONERS

VERSUS

1. Shri Ghanashyam G. Bhende,
   major, retired,

2. Smt. Bharati G. Bhende,
   major, housewife,
   both resident of Bombay,
   duly represented by their
   Attorney, Shri Deepak G.
   Bandiwadekar,
   major, teacher,
   resident of
   Sanquelim, Goa..... RESPONDENTS.

Shri S.D. Lotlikar, Sr. Advocate, with Shri A.D. Bhobe, Advocate, for the Petitioners.

Shri J.P. Mulgaonkar, Advocate for the Respondents.

CORAM : V.C. DAGA,J.

DATED : 20TH JUNE, 2002.

ORAL JUDGMENT

Rule returnable forthwith. Respondents waive service. Heard finally with the consent of parties.

This Revision Petition is directed against the Order dated 13th March, 2002 passed by the Civil Judge, Junior Division, Pernem, in Civil Miscellaneous Application No.11 of 2002 in Regular Civil Suit No.49 of 2000; whereby the Trial Court allowed amendment to the plaint subject to costs.

FACTS-IN-BRIEF:

The facts in nutshell are as under:-

2. The Respondents/original Plaintiffs filed a suit for declaration and permanent injunction seeking declaration that the gift deed dated 7-11-1983 by which the Defendant No.1 had gifted the suit property in favour of Defendant No.2 be declared null and void and also sought permanent injunction restraining the Defendants from interfering with the suit property.

3. On being summoned, the Defendants appeared and filed their Written Statement. The issues relevant to the pleadings were struck. The parties to the suit were asked to lead their rival evidence. The suit went for final hearing. While the matter was being heard finally an Application for amendment to the plaint came to be filed claiming

additional relief seeking restoration of possession of the suit property.

4. No reply was filed to oppose application seeking amendment to the plaint. The aforesaid amendment was orally opposed by the Defendants at the time of hearing of the application on the ground that the relief sought in the proposed amendment was clearly barred by limitation and that the same is belated. It was further opposed on the ground that if the amendment was allowed to be introduced at such a late stage of the suit, then, the issue would be required to be framed and the matter will have to be set down for further evidence. This would result in protracting litigation. It was also urged that if the amendment was allowed, it would result in demolition of the right accrued in favour of the Petitioners/original Defendants because of omission to claim relief of possession of the suit property.

5. In rejoinder, the Plaintiffs urged that the seeds of the amendment are already in the plaint and no new relief is being claimed and in the interest of justice the order should be maintained.

6. The Trial Court after hearing the parties, was pleased to allow the amendment

application vide its Order dated 13th March, 2002. This Order is the subject-matter of challenge in this Revision filed under Section 115 of Civil Procedure Code.

PRELIMINARY OBJECTION:

7. At the outset, the learned Counsel appearing for the Respondents raised a preliminary objection to the maintainability of the Revision and contended that in view of the Judgment of the Supreme Court in the case of **Prem Bakshi and others v. Dharam Dev and others** (2002 AIR SCW 140), the Revision Petition challenging the Order allowing the amendment is not maintainable. In his submission, impugned Order cannot be said to be an order having effect of deciding any case. In his submission this Revision Petition is liable to be dismissed at this stage giving an option to the Petitioners to challenge the impugned Order in the event they are ultimately required to carry appeal; if at all they suffer adverse decree in the suit.

8. In order to counter the above submission, the learned Counsel appearing for the Petitioners pressed into service 3-Judges Bench Judgment of the Apex Court in the case of **Shah Babulal**

Khimji v. Jayaben D. Kania and another AIR 1981 SC 1786 wherein the Apex Court relied upon the case of **Shanti Kumar R. Canji v. The Home Insurance Co. of New York** (AIR 1974 SC 1719); wherein the Apex Court was considering the effect of an Order allowing amendment of the plaint. The question at issue was whether such an order would be 'Judgment'within the meaning of Letters Patent. The Apex Court in the said Judgment made following observations:-

> " Where an amendment takes away from the defendant the defence of immunity from any liability by reason of limitation, it is a 'Judgment' within Cl.15. It is a decision affecting the merits of the question between the parties by determining the right or liability based on limitation. It is the final decision as far as the trial Court is concerned. ...."

Considering the aforesaid Judgment of the Apex Court, it is not possible to accept the contention of the Respondents that the Revision is not maintainable. The preliminary objection stands overruled.

SUBMISSIONS ON MERIT:

9. The learned Counsel for the Petitioners took me through the text of the amendment and the Order passed by the Trial Court and urged that the

claim which was barred by limitation could not have been allowed by the Trial Court so as to permit the Plaintiffs to claim possession of the property. In his submission the impugned Order is perverse and suffers from material illegality and irregularity. He further submits that if the Order allowing the amendment is upheld then in that event the relief claimed will relate back to the date of the suit and the claim which is barred by limitation would fall within limitation and the right accrued in favour of the Petitioners would get demolished. Hence the impugned Order in his submission is liable to be quashed and set aside.

10. Per contra, the learned Counsel for the Respondents submitted that the question of limitation is a factor to be taken into account while exercising discretion as to whether or not the amendment should be ordered and does not affect the power of the Court to order it, if that is required in the interest of justice. He relied upon a Judgment of the Apex Court in **L.J. Leach and Co.Ltd., and another v. Messrs. Jardine Skinner and Co.** (AIR 1957 SC 357) in support of this proposition. He thus submits once having exercised discretion in favour of the Respondents/Plaintiffs it should not be disturbed. Alternatively, he contended that where it is arguable

whether the claim sought by the amendment would be barred by law of limitation, the amendment could still be allowed making the disputed issue a subject-matter of trial. He relied upon the Judgment of the Apex Court in **Ragu Thilak D.John v. S. Rayappan and others** [(2001) 2 SCC 472] in support of this proposition and prayed dismissal of revision petition with costs.

CONSIDERATION AND FINDINGS:-

11. Having heard the parties at length, I feel that the impugned Order being discretionary need not be disturbed. The Apex Court in the case of **Uttar Pradesh Co-operative Federation Ltd. v. Sunder Bros.,** Delhi AIR 1967 SC 249 observed as under:-

> " Where the discretion vested in the Court under Section 34 has been exercised by the lower Court, the appellate Court would be slow to interfere with the exercise of their discretion. In dealing with the matter raised before it at the appellate stage, the appellate Court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage, it may have come to a contrary conclusion. If the discretion has been

> exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify such interference with the trial Court's exercise of discretion. If it appears to the appellate Court that in exercising its discretion the trial Court has acted unreasonably or capriciously or has ignored relevant facts, then it would be open to the appellate Court to interfere with the trial Court's exercise of discretion."

12. Thus applying the above principle, it is difficult to hold that the impugned Order is perverse or could not have been passed by the Trial Court. However, the impugned amendment can be saved by protecting the interest of the Petitioners by making the disputed subject-matter of an issue of trial as held by Apex Court in the case of Ragu Thilak D .John v. S. Rayappan and others (supra). The Apex Court in the case of **Vishwambhar and others v. Laxminarayan (dead) through LRs. and another** [(2001) 6 SCC 163] had an occasion to deal with similar case. The facts of the case before Apex Court were more or less close to the facts of the present case. In that case the suit filed by V was filed within the prescribed period of limitation but without the prayer for setting aside the sale deeds. Since the claim for recovery of possession of the properties alienated

could not have been made without setting aside the sale deeds the suit as initially filed was not maintainable. By the date the defect was rectified (December 1985) by introducing such a prayer by amendment of the plaint the prescribed period of limitation for seeking such a relief had elapsed. In the circumstances it was held that the amendment of the plaint could not come to the rescue of the plaintiff.

13. In the facts of the case on hand if the Petitioners/Defendants are right, then, the claim of the Plaintiffs sought to be introduced would be dismissed. If on trial relief claimed is found to be barred by limitation, in that event, such amendment cannot relate back to the date of plaint. The order allowing amendment even if held to be proper still it will not relate back to the date of plaint if trial Court on merits finds that the relief claimed by way of amendment was barred by limitation on the date it was introduced. In this view of the matter, I do not see any difficulty in maintaining the said impugned Order subject to keeping the question of limitation open. The Revision Petition is thus dismissed. The Order of the Trial Court is confirmed keeping the question of limitation open for being decided by the

Trial Court after framing a proper issue. In view of the statement made by learned Counsel for Respondents, no further fresh evidence is necessary. The evidence on record is sufficient to decide the issue of possession. It is thus made clear that the impugned amendment will have no effect of reviving the claim if it is found by the trial Court on trial of the suit that relief claimed by way of amendment was barred by limitation on the date when it was moved by the Plaintiffs.

14. In the result, the Revision is dismissed with the aforesaid observations, with no order as to costs.

V.C. DAGA,J.

ac.